

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

JUL -1 2011

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

IN RE ZACHARY R.)
) 2 CA-JV 2011-0029
) DEPARTMENT B
)
) MEMORANDUM DECISION
) Not for Publication
) Rule 28, Rules of Civil
) Appellate Procedure
)
_____)

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. 17645801

Honorable Gus Aragón, Judge

AFFIRMED

Robert J. Hirsh, Pima County Public Defender
By Susan C. L. Kelly

Tucson
Attorneys for Appellant

Barbara LaWall, Pima County Attorney
By Barbara S. Gelband

Tucson
Attorneys for Appellee

ECKERSTROM, Judge.

¶1 After a contested adjudication hearing in February 2011, the juvenile court found seventeen-year-old Zachary R. had committed the offenses of second-degree burglary and theft by control. The court adjudicated Zachary, a repeat felony juvenile offender, delinquent and placed him on juvenile intensive probation until his eighteenth birthday.¹ On appeal, Zachary argues the evidence was insufficient to prove he had committed the charged offenses. He asks this court to vacate the delinquency adjudication. We affirm.

¶2 When reviewing a delinquency adjudication, “we will not re-weigh the evidence, and we will only reverse on the grounds of insufficient evidence if there is a complete absence of probative facts to support the judgment or if the judgment is contrary to any substantial evidence.” *In re John M.*, 201 Ariz. 424, ¶ 7, 36 P.3d 772, 774 (App. 2001). We view the evidence in the light most favorable to sustaining the adjudication. *In re Julio L.*, 197 Ariz. 1, ¶ 6, 3 P.3d 383, 384-85 (2000).

¶3 A person commits second-degree burglary pursuant to A.R.S. § 13-1507(A), by “entering or remaining unlawfully in or on a residential structure with the intent to commit any theft or any felony therein.” Section 13-1501(2), A.R.S., defines unlawful entry as “an act of a person who enters or remains on premises when the person’s intent for so entering or remaining is not licensed, authorized or otherwise privileged.” Pursuant to A.R.S. § 13-1802(A)(1), a person commits theft if, “without lawful authority, the person knowingly . . . [c]ontrols property of another with the intent to deprive the other person of such property.” Section 13-1801(A)(2), A.R.S., defines

¹Zachary will turn eighteen in June 2011.

“[c]ontrol” as acting “to exclude others from using their property except on the defendant’s own terms,” while § 13-1801(A)(4) defines “[d]eprive” as “to withhold the property interest of another either permanently or for so long a time period that a substantial portion of its economic value or usefulness or enjoyment is lost, [or] to withhold with the intent to restore it only on payment of any reward or other compensation.”

¶4 The evidence here established that in November 2010, Zachary was close friends with D., whose mother was the victim, M. According to D., M. did not like his friends, and she did not know that Zachary often came to the house to visit D. when she was not home. Zachary and D. frequently entered each other’s homes through their respective bedroom windows. On the day of the incident, D. had invited Zachary to come to his house so the boys could take D.’s video game console, a PlayStation 2, to use at Zachary’s house. Although D. did not tell Zachary he could take the PlayStation even if D. was not there, D. testified that, based on their conversation and the fact that the PlayStation had been at Zachary’s house in the past, Zachary “knew” he could remove it.

¶5 Before Zachary arrived, D. had an argument with his mother on the telephone and then “ran away.” Pima County sheriff’s deputy Jeff Castillo testified that Zachary admitted he had climbed into the house through D.’s bedroom window and had removed the PlayStation from the house. Zachary also told the deputy he had asked a friend who was with him to write a note, which Zachary characterized as a joke, stating the PlayStation had been stolen and was being held “hostage.” After telling the friend to write the note, Zachary climbed out D.’s bedroom window with the PlayStation in hand.

The note, which was admitted as an exhibit at the adjudication hearing, is set forth without correction below:

we miss you, you need to come back to us even if only to tell us your ok. and hey maybe even tell us whats going on. Zach says he needs you back asap. As well as me also Oh and hey we Broke into your room today, and took your PS2 hostage. If you want it back come to us you know where we are.

P.S. distroy this when your done

The note was signed with a heart symbol and “always us,” followed by two names that, according to testimony at the hearing, read “Heather & Zach” when held up to the light, even though they are scratched out on the paper. D. testified his father previously had given him the PlayStation as a Christmas gift. However, M. testified that she and D.’s father previously had purchased the PlayStation, which belonged to the family, and that D. was not permitted to give it away or to let others remove it from the house. M. further testified that Zachary did not have permission to take the PlayStation, that he was not a “welcome visitor” at the family home, and that she had not given Zachary permission to enter the house through D.’s window.

¶6 Zachary argues that the evidence presented at the adjudication hearing does not permit an inference that he intended to enter M.’s house to commit any felony, including burglary, or that he intended to deprive M. of her property. *See* §§ 13-1501(2), 13-1507(A), 13-1802(A)(1). He further asserts that the relevant statutes do not contemplate a “harmless, mutual joke,” like the one that occurred here. The juvenile court described the note as “compelling” and found it “very inappropriate that the young

persons were entering the properties of each other through windows without the parents' permission." Comparing D.'s testimony to his mother's, the court determined, "D[.] was not a credible witness but his mother was," and the court concluded that "as the parent, [M.] is entitled to make the rules of her household."

¶7 Both Zachary and the state acknowledge that the intent necessary to commit burglary can be established by circumstantial evidence. *See State v. Evans*, 110 Ariz. 407, 408, 519 P.2d 1148, 1149 (1974). Thus, based on the evidence presented at the hearing, the juvenile court could reasonably infer that Zachary had committed burglary and theft, as alleged in the delinquency petition. There was evidence that, despite knowing he was not permitted to visit D.'s home, much less enter the house through a window, Zachary had done so. M. also testified that D. did not have permission to loan the PlayStation to others. That evidence, combined with the note showing that Zachary admitted to having taken the PlayStation with the intent to deprive at least D. of its use, supports the court's adjudication. *See State v. Malloy*, 131 Ariz. 125, 130, 639 P.2d 315, 320 (1981) ("[W]hile the requisite intent may not be inferred from mere entry or theft alone, any additional factor may be sufficient to warrant such an inference.").

¶8 Ultimately, the juvenile court found that D. was not a credible witness and that M. was. Because "personal observation of witnesses is crucial to accurate fact-finding when the outcome of a juvenile delinquency adjudication depends on an assessment of the credibility of the witnesses," *In re Pima County Juv. Action No. 63212-2*, 129 Ariz. 371, 375, 631 P.2d 526, 530 (1981), we defer to the juvenile court as the

rightful finder of fact. *See In re Maricopa County Juv. Action No. JV-132905*, 186 Ariz. 607, 609, 925 P.2d 748, 750 (App. 1996) (juvenile court in best position to measure credibility of witnesses). Moreover, to the extent Zachary argues that his actions were a mere joke, and not within the contemplation of the statutes, we can infer the court was not persuaded that his conduct could be characterized as a joke, a finding we will not disturb on appeal.

¶9 Because substantial evidence supported the juvenile court’s findings, we affirm the court’s order adjudicating Zachary delinquent and its disposition order.

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge